

CASES AND MATERIALS
ON THE LAW
OF TORTS
EXPERIMENTAL EDITION
PART II

E.R. Alexander

J.B. Dunlop

Faculty of Law
University of Toronto

1987

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CHAPTER V: THE TEST OF FAULT: OBJECTIVE OR SUBJECTIVE? HEREIN OF
THE STANDARD OF CARE IN NEGLIGENCE

We saw in Section 3 of Chapter I that in most tort actions today before a defendant will be liable to a plaintiff he must have been at "fault" in the sense that he must have intended the plaintiff's injury or have been negligent with respect to it. In the chapters dealing with intentional interferences with the person and property we explored, among other matters, the meaning of intention and how it differs from motive. However, the emphasis in those chapters was more on the constituent elements of the various intentional torts and the nature of the interests being interfered with than it was on the nature of the defendant's conduct.

In Chapter V we are primarily concerned with the nature of the defendant's conduct and whether it can be characterized as fault. Here we are concerned with how fault is determined. Is the test of fault objective or subjective? In determining whether the defendant was at fault in either intentionally or negligently injuring the plaintiff do we look only at what the defendant did or are we also interested in his state of mind at the time he did it?

The first group of cases in this Chapter is concerned with the tort liability of lunatics and children. As we shall see, many courts apply a more or less subjective test in determining the capacity of those suffering such disabilities to injure others either intentionally or negligently. The remaining cases in the Chapter are concerned with the more or less objective test applied in negligence actions to all those not suffering from lunacy or infancy, a test based on the reasonable man of ordinary prudence.

In this Chapter we begin the study of negligence as a basis of tort liability, and, as Fleming says (Law of Torts, 6th ed. 1983, at p.98); "it is important to grasp at the outset that negligence is not a state of mind, but conduct that falls below the standard regarded as normal or desirable in a given community. The subjective notion of personal 'fault' has long been discarded in favour of the stricter, impersonal standard of how a reasonable man would have acted in the circumstances. In this manner, while retaining a verbal link with the moral criterion of fault, the admonitory function of the principle has been largely overshadowed for the sake of compensating accident victims, regardless of the 'wrongdoer's' subjective blameworthiness." (footnotes omitted). And the same author adds at the beginning of his chapter on the standard of care in negligence (id. at p. 101): "Negligence is conduct falling below the standard demanded for the protection of others against unreasonable risk of harm. This standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do in the circumstances. The behaviour of individuals is so incalculable in its variety, and the possible combinations of circumstances giving rise to a negligence issue so infinite, that it has been found undesirable, if not impossible, to formulate precise rules of conduct for all conceivable situations. In order to ensure a high degree of individualization in the handling of negligence cases, the law has adopted an abstract formula, that of the reasonable man, and has left to the jury, or to a judge in their stead, the task of concretizing and applying that standard in individual cases." (footnote omitted).

VAUGHAN v. MENLOVE
Common Pleas. 1837 132 E.R. 490

... At the trial it appeared that the rick in question had been made by the Defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire: that though there were conflicting opinions on the subject, yet during a period of five weeks, the Defendant was repeatedly warned of his [471] peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the Defendant's barn and stables, and thence to the Plaintiff's cottages, which were entirely destroyed.

CHAPTER VI

AN ANATOMY OF NEGLIGENCE: RISK TO WHOM? AND RISK OF WHAT?

In Chapter V we saw that negligence involves the creation of unreasonable risks of harm. And we saw that, lunatics and children aside, in determining whether a particular defendant was negligent, i.e., had created unreasonable risks of harm, the court applies a more or less objective test: it compares what the defendant did with what a reasonable man would have done in the same circumstances.

The basic problem in negligence litigation is one of limitation of liability. As Fleming says (Law of Torts, 6th ed. 1983, at pp. 98-9): "Some interests are protected against negligent interference, others are not. However welfare-minded, we are still far from exacting tort compensation for every kind of harm caused to anyone by conduct fraught with risk of some injury. Negligence is a matter of risk, i.e., of recognizable danger of harm. This immediately raises the question 'Risk to whom?' and 'Risk of what?' For the purpose of dealing with these questions, the courts have evolved a number of artificial techniques, like 'duty of care' and 'remoteness of damage', which are concerned with the basic problems of what harms are included within the scope of the unreasonable risk created by the defendant, and what interests the law deems worthy of protection against negligent interference in consonance with current notions of policy. Since the definition of tortious negligence does not furnish any clue to its conditions of actionability beyond a mere reference to the nature of the defendant's conduct, these ancillary mechanisms assume a vital importance in delimiting the scope of legal protection against inadvertent harm."

In this chapter we will examine these artificial techniques for limiting liability in negligence. They do not themselves furnish reasons for particular results. They merely furnish ways of stating results. When the courts are dealing with the question of 'Risk to whom?' they normally talk 'duty of care'. When they are dealing with the question of 'Risk of what?' they normally talk 'remoteness of damage' or 'proximate cause'.

Since negligence is a matter of risk--of recognizable danger of harm resulting from the defendant's conduct--foreseeability of harm plays an important role in deciding whether the defendant was negligent. Not determinative, because the risk, although foreseeable, may be very small (Bolton v. Stone, *supra*, p.515) and any utility in the defendant's conduct has to be balanced against the harm risked (Priestman v. Colangelo, *supra*, p.521) in deciding whether the risks were unreasonable, i.e., in deciding whether the defendant was negligent.

And foreseeability of harm also plays an important role in answering the questions of 'Risk to whom?' and 'Risk of what?'. Again not determinative, because considerations of policy may dictate a finding

of 'no duty' or 'no proximate cause' despite a finding of foreseeability of harm to a particular person or of a particular kind. And conversely, despite a finding of unforeseeability, policy may dictate a finding of 'duty' or 'proximate cause'. In recent years the courts, particularly the English courts, often have been prepared to articulate their policy considerations. And this has been especially true when the plaintiff is complaining of a negligent interference, not with his physical person or tangible property, but with an economic interest. Some of the cases towards the end of the chapter raise the distinction between tangible property and economic interests. In a later chapter we will deal with the special problem of negligent misrepresentation (normally involving words as opposed to action) and economic interests, where considerations of policy are crucial. The cases in this chapter involve negligent action, as opposed to negligent words, although in some of them there is an element of misrepresentation.

This chapter contains some of the best known, and most difficult, cases in the common law world of torts.

(a) Duty of Care

WINTERBOTTOM v. WRIGHT

Court of Exchequer, 1842 152 E.R. 402

Case. The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and

secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also, not on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and [110] his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, and infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and in consequence of injuries then received, had become lamed for life. . . .

Byles, for the defendant, objected that the declaration was bad in substance. This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that [111] wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be *ex contractu* or *ex delicto*, the party who made the contract alone can sue: *Tollit v. Sherstone* (5 M. & W. 283). If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences

RECOMMENDED READING

1. Fleming, Remoteness and Duty: The Control Devices in Liability for Negligence (1953), 31 Can. Bar Rev. 471.
2. Prosser, Palsgraf Revisited (1953), 52 Mich. L. Rev. 1
3. Alexander, One Rescuer's Obligation to Another: The 'Ogopogo' Lands in the Supreme Court of Canada (1972), 22 U. of T. L.J. 98
4. Fleming, The Passing of Polemis (1961), 39 Can. Bar Rev. 489.
5. Weinrib, The Dorset Yacht Case: Causation, Care and Criminals (1971), 4 Ottawa L.Rev. 389
6. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer) (1960), 69 Yale L.J. 1099.
7. Harvey, Economic losses and negligence (1970), 50 Can Bar Rev. 580.
8. Stevens, Negligent Acts causing pure financial loss: policy factors at work, (1973), 23 U. of T. L.J. 431.
9. Waddams, Products liability (1974), 52 Can. Bar Rev. 96.
10. Ontario Law Reform Commission, Report on Products Liability, (1979).
11. Burns, Tort Injury to Economic Interests (1980), 58 Can. Bar Rev. 103.
12. Bishop, Economic Loss in Tort (1981), 2 Oxford J.L.S. 1.
13. Trebilcock & Rogerson, Products Liability and the Allergic Consumer (1986), 36 U. of T. L.J. 52.
14. Newdick, The Future of Negligence in Product Liability (1987), 103 Law Q.Rev. 288.

